United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2084

TO BE ARGUED BY:
Michael J. Obus

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

BOSSIE LEE HOLLAND, :

Petitioner-Appellant :

- against - :

COUNTY COURT OF NASSAU COUNTY, :

Respondent-Appellee :

- -x

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P/S

DOCKET NO. 76-2084

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from an order dismissing a petition for a writ of habeas corpus, entered on July 21, 1976, by the Honorable Jacob Mishler, Chief Judge of the United States District Court for the Eastern District of New York. The order and opinion are unreported and are reproduced at pages one through seven of the Appendix.

In the District Court the petitioner-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, New York, who is continuing to represent the petitioner-appellant in this Court.

OPINION AND ORDER BELOW

On July 21, 1976, the United States District Court for the Eastern District of New York (Mishler, Ch. J.) filed a memorandum of decision and order dismissing the petition for a writ of habeas corpus (see pp. 1 through 7 of appendix for complete decision). Petitioner had claimed that evidence seized from his automobile and admitted at his trial was the tainted fruit of his unlawful arrest (A-1). The Court reviewed the opinion of the United States Supreme Court in Stone v. Powell, _____U.S._____ 96 S. Ct. 3037, 49 L.Ed.2d 1067 (1976), and grounded its denial of the petition on a finding that petitioner had had a full and fair opportunity to litigate his Fourth Amendment claim in the New York State courts (A-6).

THE ISSUE PRESENTED

1. Did petitioner have "an opportunity for full and fair litigation" of his claim that evidence seized from his automobile was the tainted fruit of his unlawful arrest, where that issue was not adjudicated in the State courts because of a procedural default?

STATEMENT OF THE CASE

On January 17, 197[illegible], petitioner was convicted after trial in the County Court of Nassau County (Young, J.) of burglary in the third degree, petit larceny, and possession of burglar's tools and was sentenced to an indeterminate term of imprisonment with a maximum of four years on the former conviction and definite terms of imprisonment of one year each on the latter convictions, to run concurrently.

In the State trial court, petitioner moved to suppress evidence seized from his automobile by the police. A suppression hearing was held (A10-99) and petitioner's argument that he had not voluntarily consented to the search of his automobile (A104-107, 110-111) was rejected (A114-119).

On direct appeal to the Appellate Division of the Supreme Court for the Second Judicial Department petitioner contended that the evidence seized pursuant to his alleged consent to the automobile search was the tainted fruit of his arrest without probable cause (A128, 134). The Appellate Division affirmed without opinion on December 17, 1975, People v. Holland, 50 A.D.2d 849 (2nd Dept., 1975), and leave to appeal to the New York State Court of Appeals was denied on February 6, 1976. People v. Holland, 38 N.Y.2d 944 (1976).

On February 25, 1976, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York based upon his "fruit

of the poisonous tree" argument (A124). By an order dated July 21, 1976, the petition was denied (Mishler, Ch. J.) (A1-7). A certificate of probable cause was issued by the Eastern District Court on July 30, 1976 (A9) and a notice of appeal was timely served and filed (A8).

STATEMENT OF FACTS

At the suppression hearing in Nassau County Court Detective Robert Donohue testified that he first came into contact with petitioner Holland on April 9, 1974 in an apartment located at the rear of 95A Nassau Road, Roosevelt, New York (A11, 21). After informing Holland that he was investigating a burglary, Donohue "asked" petitioner to accompany him to the First Precinct station-house for questioning (A12, 19). Donohue said that although Holland refused to answer questions or sign statements (A23, 30, 31), he voluntarily consented to the search of his automobile (A13-14, 22, 23, 31), which produced a typewriter cover, various tools, a mask, gloves and a flashlight (A15, 16, 29).

Petitioner Holland testified that on the afternoon of April 9, 1974 upon his arrival at an apartment located at the rear of the Nelson Plumbers shop he was confronted by Detective Donohue and the complainant, Robert Nelson, who accused him of stealing certain property (A33-34). Donohue told him that he was a suspect in a burglary and took Holland in a police car to the First Precinct (A33-34, 66). Petitioner testified that he refused to make any statements (A35, 36), that he did not consent to the search of his automobile, that he was ordered to produce the contents of his pockets and that Detective Donohue took his car keys without permission (A37, 38, 44, 45, 66).

In its findings of fact after the Search and Seizure hearing the Trial Court found that Detective Donohue of the Nassau County Police Department was advised to investigate the burglary of an office at 95A Nassau Road, Roosevelt, New York. He went to a rear apartment at that address where he encountered petitioner who produced a drivers license when asked for identification. The Detective then requested that petitioner go with him to the First Precinct Stationhouse "for further investigation." Petitioner was taken to the Detective Squadroom where he was advised of his "Miranda" rights and he refused to answer any questions. Petitioner was permitted to telephone an attorney from the stationhouse. The Court found that Detective Donohue subsequently received a phone call from the complainant who advised him of the location of petitioner's car. It found that the Detective asked for and received petitioner's permission to search the vehicle. From the trunk, Donohue seized a typewriter cover, and from on and under the front seat he seized various tools, a mask and gloves.

The Court concluded that petitioner was "under arrest" when he first arrived at the stationhouse, but that he voluntarily consented to the search of his automobile. No specific finding was made as to whether or not there was probable cause for the arrest (A114-120).

ARGUMENT

POINT ONE

PETITIONER DID NOT HAVE "AN OPPORTUNITY FOR FULL AND FAIR LITIGATION" OF HIS FOURTH AMENDMENT CLAIM IN THE NEW YORK STATE COURTS

Petitioner's application for a writ of habeas corpus was denied by the District Court on the ground that he had had a full and fair opportunity to litigate his Fourth Amendment claim in the New York State Courts within the meaning of the companion cases of Stone v. Powell and Wolff v. Rice, 428 U.S. _____, 96 S.Ct. 3037, 49 L.Ed2d 1067 (1976). Petitioner contends that because of an unintentional procedural default he did not have such an opportunity and that, absent a finding that he deliberately by-passed orderly state procedures, his claim should be adjudicated on its merits.[1]

In the State trial court, petitioner objected to the admission into evidence of items seized from his automobile, and after a suppression hearing, his argument that he had not voluntarily consented to the search of the car was rejected (A114-119). The hearing did not focus on the legality of petitioner's custody at the time of the alleged consent, however, and no finding on the issue of probable

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[1] The District Court, in holding that petitioner had had a full and fair opportunity to litigate his Fourth Amendment claim, did not find that petitioner had deliberately by-passed state procedures. Trial counsel had moved to suppress the evidence in question on Fourth Amendment grounds but had inadvertantly failed to raise the "fruit of the poisonous tree" argument which would not have been inconsistent with the voluntariness argument he did make. Nothing in the record supports a finding of deliberate by-pass and indeed, if the District Court had made such a finding, it most likely would not have granted the certificate of probable cause.

cause for arrest was made. On direct appeal and on his application for a writ of habeas corpus, petitioner contended that the evidence seized was the inadmissible fruit of his unlawful arrest, and on both occasions he was met by the argument that he had waived this claim by failing to raise it in the trial court (A124, 128, 134-138). The Appellate Division affirmed without opinion and the District Court dismissed the petition on the authority of Stone v. Powell, supra, which had come down after all papers had been submitted and arguments heard.

In Stone v. Powell, supra, 49 L.Ed.2d at 1088 and n. 37, the Supreme Court held that although federal courts do not lack jurisdiction over Fourth Amendment claims, the exclusionary rule may not be applied and habeas corpus relief may not be granted where a state prisoner has had "an opportunity for full and fair litigation" of his claim in the state courts. The state prisoners in both Stone and Wolff had raised their Fourth Amendment claims at trial. These claims had been rejected on direct appeal (on harmless error grounds in Stone) but had constituted the basis for habeas corpus relief in the lower federal courts. Id. at 1073-1075.

In reviewing the history of the federal writ of habeas corpus, the Stone court noted that it had not in the past considered "whether exceptions to full review might exist with respect to particular categories of

constitutional claims." Id. at 1078. It stated that although it had accepted jurisdiction in several cases presenting Fourth Amendment issues on habeas corpus,[2] and although the discussion in Kaufman v. United States, 394 U.S. 217 (1969), which held that search and seizure claims are cognizable in §2255 proceedings,[3] rested on "the view that the effectuation of the Fourth Amendment ...requires the granting of habeas corpus relief when a prisoner has been convicted in state court on the basis

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2 See, e.g., Mancusi v. DeForte, 392 U.S. 364 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Warden v. Hayden, 387 U.S. 294 (1967); Cady v. Dombrowski, 413 U.S. 583 (1973); Lefkowitz v. Newsome, 420 U.S. 283 (1975).

3 Kaufman v. United States, supra, has been read as providing for §2255 relief only to federal prisoners who had neither presented their claims to the federal courts in the first instance nor knowingly waived them, "that is, only to those federal prisoners who did not have a realistic opportunity to present their claims to a federal court..." Tushnet, Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte, 1975 Wisc. L. Rev. 484, 485 n. 5. Cf. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Chi. L. Rev. 142, 163 n. 109 (1970); Note, Developments in the Law--Federal Habeas Corpus, 83 Harv. L. Rev. 1038, note 9, at 1064-1066 (1970).

of evidence obtained in an illegal search or seizure...," the Court had not "had occasion to fully consider the validity of this view."[4] Stone, supra, 49 L.Ed2d at 1079-1080.

The Stone Court then traced the development of the exclusionary rule and undertook a cost/benefit analysis of its application on habeas corpus. It noted that the exclusionary rule "was a judicially created means of effectuating the rights secured by the Fourth Amendment," that "the rule is not a personal constitutional right," and that although the Court's decisions "often have alluded to the 'imperative of judicial integrity,'" the rule's "primary justification ...is the deterrence of police conduct that violates Fourth Amendment rights." Id. at 1081-1083. Turning to the costs of applying the exclusionary rule at trial and on direct review the Court emphasized that its application tended to deflect the truthfinding process.

> "...the focus of the trial, and the attention of the participants therein, is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." Id. at 1085.

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4 In Schneckloth v. Bustamonte, 412 U.S. 218, 249 n. 38 (1973), and Cardwell v. Lewis, 417 U.S. 583, 596 n. 12 (1974), the respective majority and plurality opinions pointed out that they were not addressing the issue of the substantive scope of the writ found to be determinative in the concurring opinions of Mr. Justice Powell.

The Stone Court found the "assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal" to be a "dubious" one and rejected the argument that the state courts "cannot be trusted to effectuate Fourth Amendment values through fair application of the rule..." Id. at 1087 and n. 35. Consequently, while adhering to the view that the deterrent value of the exclusionary rule warrants its implementation at trial and on direct appeal, the Court determined that the limited additional contribution to the rule's 'overall educative effect" made by its application on habeas corpus is not worth the acknowledged and persistent costs where a petitioner has had "an opportunity for full and fair litigation" of his claim. Id. at 1087-1088.

In restricting the scope of habeas corpus review of Fourth Amendment claims, the Court in Stone did not elaborate on the phrase "opportunity for full and fair litigation." An examination of the opinion and the policies behind it, however, indicates that the Court did not intend to preclude the assertion of a claim that had not been fully and fairly litigated because of a procedural default. Such a default generally precludes the assertion of a claim on habeas corpus only where an applicant has "deliberately by-passed the orderly procedure of the state courts." Fay v. Noia, 372 U.S. 391, 438 (1963);

Henry v. Mississippi, 379 U.S. 433, 452 (1965); United States ex rel Irons v. Montanye, 520 F.2d 646 (2nd Cir., 1975); United States v. Garrett, 457 F.2d 1311 (9th Cir., 1972); United States ex rel Vanderhorst v. LaVallee, 417 F.2d 411 (2nd Cir., 1966); but see Francis v. Henderson, _____U.S._____, 48 L.Ed2d 149, 96 S.Ct..1708 (1976). This was conceded by respondent in the District Court to be the appropriate test (A 138),[5] and the Stone case does not indicate a change in the waiver standard with regard to Fourth Amendment claims.

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5 In Francis v. Henderson, supra, the Supreme Court held that a state prisoner who had failed to make a timely challenge to the composition of the grand jury that indicted him, could not raise such a claim on federal habeas corpus, absent a showing of cause and actual prejudice. The Court had held in Davis v. United States, 411 U.S. 233 (1973), that such a claim was not available to a federal prisoner under 28 U.S.C. §2255. That decision had been based upon an interpretation of the Congressional intent behind FRCrP 12 and had emphasized the "strong tactical considerations" which would otherwise militate in favor of delay. Davis, supra, at 241. The Francis Court found, as a matter of comity, that these considerations were no less applicable to an explicit state waiver rule involving the same substantive constitutional right.
Fourth Amendment claims, however, do not go to defects in the institution of criminal proceedings, and even Judge Friendly would agree that counsel would not be likely to intentionally withhold meritorious search and seizure claims. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 39 Chi. L. Rev. 142, 158 (1970). Additionally, a "major tenet of the Davis decision was that no prejudice was shown," whereas the prejudice in a case such as the instant one is apparent. Wainwright v. Sykes, 528 F.2d 522 (5th Cir., 1976).

Initially, it is important to note that in the cases before the Supreme Court, the petitioners had timely raised their Fourth Amendment claims and had received full hearings in the state courts. Indeed, when the Court turned to the "specific question presented by these cases," it stated, "The question is whether state prisoners -- who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review -- may invoke their claim again on federal habeas corpus review." Id. at 1085 (emphasis added). And in evaluating the costs of the exclusionary rule it found that these costs persisted "when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts." Id. at 1086. Clearly, in foreclosing an additional review to the state prisoners in Stone and Wolff, and consequently narrowing the scope of habeas corpus review generally, the Court did not have before it, and was not considering, a case in which there had been no state review of the Fourth Amendment claim in the first place.[6]

In Stone, the Court rejected as not being determinative of the scope of habeas corpus a number of cases in which Fourth Amendment claims of state prisoners had been adjudicated on collateral review, noting, as had Justice Black in his

6. The Stone Court noted that in granting certiorari in Wolff v. Rice, it had requested that counsel address the question, "Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U.S.C. §2254." Stone, supra, 49 L.ED.2d at 1076n.5. (emphasis added).

dissent in Kaufman v. United States, supra, at 239, and n.7, that the issue had not been presented to the Court and that "only in the most exceptional cases will [the Court] consider issues not raised in the petition [for certiorari]." Stone, supra, 49 L. Ed.2d at 1080 n. 15. This rule of interpretation should apply to the Stone decision as well. The problem of procedural default was not before the Court in Stone, and the "opportunity for full and fair litigation" spoken of therein can only be taken to refer to the exercised opportunity enjoyed by the state prisoners in that case.

The only direct indication given in Stone as to the meaning of "opportunity for full and fair litigation" is in a footnote to that phrase which simply states, " Cf. Townsend v. Sain, 372 U.S. 293 (1963)." Id. at 1088 n. 36.[7] Applying a standard analogous to the Townsend test for determining the need for holding evidentiary hearings in habeas corpus cases, it is clear that the instant suppression hearing did not constitute a "full and fair litigation" of petitioner's claim.

In Townsend v. Sain, 372 U.S. 293, 312-313 (1963), the Court held,

> "Where facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding."

Evidentiary hearings were mandated where "the merits of the

7. Mr. Justice Powell's concurring opinion in Schneckloth v. Bustamonte, supra, at 250, has been read as invoking the Townsend criteria to determine habeas corpus jurisdiction of Fourth Amendment claims. Tushnet, supra, at 495-496.

factual dispute were not resolved in the state hearing" and where "the material facts were not adequately developed at the state court hearing." Townsend v. Sain, supra, at 313.

The Fourth Amendment claim at issue here, that evidence introduced at petitioner's trial was the inadmissible fruit of his unlawful arrest, was raised for the first time on direct appeal. In the District Court, petitioner and respondent agreed that the state suppression hearing had not focussed on this issue and that the relevant findings, including whether there was probable cause for the arrest, had not been made by the trial court (A124, 128, 134-138). Respondent's memorandum of law below repeatedly referred to the "incomplete record" and accurately pointed out the likelihood that the merits of petitioner's claim had not been adjudicated in the state courts (A 136-138).

The Townsend Court, in specifically discussing the case of a state court record that has not been sufficiently developed because of a procedural default by the petitioner, invoked the "deliberate by-pass" standard of Fay v. Noia, supra.

> "If for any reason not attributable to the inexcusable neglect of petitioner, see Fay v. Noia, 9L. Ed2d 868 (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. The standard of inexcusable default set down in Fay v. Noia, adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures." Townsend, supra, at 317.

Therefore, under a test for determining the availability of collateral relief analogous to the Townsend test for determining the necessity for evidentiary hearings, petitioner's claim must be found to be cognizable.

Finally, the policy considerations deemed to be controlling in Stone support petitioner's contention that under the circumstances of this case, his Fourth Amendment claim is cognizable on habeas corpus. In not precluding all search-and-seizure claims, the Supreme Court determined through a balancing process that the overall deterrent value of the exclusionary rule will be sufficiently enhanced, despite its costs, by its application on habeas corpus as part of a policy known to law enforcement authorities that Fourth Amendment claims will be adequately adjudicated by at least one court, whether state or federal. Petitioner's claim, not having been fully and fairly adjudicated in the state courts, should be available to him now.

The Stone Court's objective in not totally foreclosing application of the exclusionary rule on habeas corpus was clearly not to remedy injustices done to individual defendants. The Court was quite emphatic that the rule is not a personal right.

> It[the exclusionary rule] is not calculated to redress the injury to the privacy of the victim of the search or seizure for any '[r]eparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965)." Stone, supra, 49 L.Ed2d at 1083.

In terms of enforcing the deterrent purpose of the exclusionary rule there can be no more concern for the individual whose potentially meritorious claim was not fully litigated than for one whose claim was erroneously rejected because of a misinterpretation of the Fourth Amendment.

Nor can the remaining bastion of Fourth Amendment review on habeas corpus be attributed to fear of pervasive unfairness in state court procedures or to an attempt to keep the state courts "honest." The Stone court, in rejecting policy arguments in support of across-the-board habeas corpus review of search-and-seizure claims stemming "from a basic mistrust of state courts as fair and competent forums for the adjudication of federal constitutional rights," stated that it was "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." Id. at 1087, n. 35. Given the Supreme Court's unwillingness to permit general review of substantive Fourth Amendment claims on habeas corpus, there can be no justification, in terms of mistrust of the state courts, for subjecting state court procedures to closer scrutiny.

The basis of what remains of Fourth Amendment "jurisdiction" on federal habeas corpus can only be found in the exclusionary rule's primary purpose of policing the police. In effectively rejecting the necessity of a "final federal say" on habeas corpus under the circumstances in Stone,

the Court nevertheless found it necessary to assure at least one adequate judicial "say" to sufficiently secure compliance by law enforcement authorities with the Fourth Amendment. In terms of the factors deemed to be controlling in Stone, there is no difference between, on the one hand, granting habeas review due to an inadequate adjudication because of defective state procedure, and on the other hand, granting it due to an inadequate adjudication because of an inadvertant procedural default. In both cases the costs in deflecting the truthfinding process are the same, and the incremental addition to the deterrent effect of the exclusionary rule is the same. Additional policy considerations, such as "comity and concerns for the orderly administration of criminal justice" (Francis v. Henderson, supra, 48 L. Ed2d at 152), bearing on whether that adequate adjudication should be denied because a defendant inadvertantly failed to request it at trial, were not before the Court.

In light of the procedural facts to which Stone was addressed, the direct reference to Townsend v. Sain, supra, and the policy considerations held to be determinative, the Stone court cannot cannot be said to have constricted the waiver standard for Fourth Amendment claims otherwise cognizable on federal habeas corpus. Petitioner did not have an "opportunity for full and fair litigation" of his Fourth Amendment claim within the meaning of Stone, he did not deliberately by-pass that opportunity, and his claim should be adjudicated on its merits.

CONCLUSION

FOR THE ABOVE STATED REASONS THIS COURT SHOULD REVERSE THE ORDER OF THE DISTRICT COURT AND REMAND THE CASE FOR ADJUDICATION OF THE MERITS OF PETITIONER'S FOURTH AMENDMENT CLAIM.

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